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The Last Bar Examination (2009)

Roger Bernhardt

What struck me about the Property question in the most recent bar exam was its utter irrelevance to modern practice. It began with Ann, Betty, and Celia purchasing a condominium unit as joint tenants. Why it mattered that the property was a condominium was never shown, since nothing ever came of that fact—perhaps the questioner wanted to look modern, or instead hoped to confuse test-takers into thinking that that fact had something to do with some issue, although it did not. It would have been relevant to a real estate practice to ask whether an attorney should advise these three purchasers to take title as tenants in common rather than as joint tenants, given that they did not seem to be related, but joint tenancy was made a given in the question, eliminating any chance for giving advance legal advice about it. Examinees were asked to give judgments about completed legal facts rather than giving any advice to clients about structuring deals.

What happened next in the problem is that Ann and Celia both executed deeds of their respective interests to Ed, each of them reserving life estates in themselves. Ann delivered and recorded her deed, but Celia recorded her deed “solely to protect her life estate interest” and then put it in a sealed envelope with instructions to deliver it back to her on demand or to Ed if she died; whereupon Ann later improperly mailed a copy of the deed to Ed. Finally, Ann and Celia are killed (apparently simultaneously) in a car accident!

Facts of this sort would occur only in the worst of bad fiction—no such case could ever come across an attorney’s desk in the real world. Owners do not convey their property with reserved life estates, record them for special and illogical psychological reasons, place them in envelopes with peculiar instructions, and then have third parties copy and mail the copies contrary to those instructions. How does a student concoct an intelligent analysis of these facts that will reveal anything about his or her ability to handle actual problems of real people, *i.e.*, to practice law?

The first question was what interests Betty and Ed had as a result of those foregoing antics. Some features were easy. Ann’s conveyance severed the joint tenancy (with or without the reservation of a life estate and with or without the recording, especially after her death), so that Ed acquired her one third as a tenant in common.

The disposition of Celia’s interest was more complicated; mainly, it depended on whether her deed was treated as delivered. The Daily Journal’s analysis concluded there was no delivery, so that Ed took nothing from it and Celia’s share went to Betty by survivorship. On the other hand, the Recorder’s answer opined that the delivery was effective—not because of the envelope but because of its recordation—so that Celia’s share did go to Ed. (Neither answer made anything out of the fact that Ed received only a copy of the deed in the mail.) Thus, one paper gave Ed one third while the other gave him two thirds. Should one of these positions be flunked? There was enough uncertainty about the Alice in Wonderland facts to make me hope that the graders take equally charitable views of both positions.

The second and third questions involved some additional facts: Betty had originally moved out of the unit, but then she moved back in after Ann and Celia died; she thereafter operated a computer business in one of the bedrooms, rented out the other bedroom to a tenant, and paid for some “necessary repairs.” The questions then asked whether Ed could share in the rents Betty collected from the tenant or charge her rent for the computer business (Part 2) and be charged for

contribution to the necessary repairs (Part 3). I regret that these issues were split up into separate questions because that had the effect of making it difficult to discuss how either set of claims might have offset the other.

As far as Betty owing Ed (and ignoring how the original three owners ever expected to share a two-bedroom unit, or whether the condominium rules permitted doing business inside the unit), both model answers said that a cotenant could not be charged rent for personal occupancy and could be made to share rents collected from a third person—right answers, but hardly worth making into an essay question. (Who was entitled to the extra third of the tenant's rent depended, of course, on how the earlier delivery question was resolved.)

As for Ed's liability for the "necessary repairs," the Recorder said that because Betty was occupying the unit, she was "obligated to pay the cost of maintenance up to the fair market rental value" but could get contribution if her costs exceeded that number. The Daily Journal started by saying that Betty could get contribution for payments in excess of her prorata share of the repairs, but only if she had notified Ed of the need for repairs. I cannot say that I absolutely agree with either opinion, but both were as good as the meager facts of question deserved. I wish the examinees had been told what those payments covered, because Betty's rights and remedies might vary depending on whether those bills were for, *e.g.*, property taxes, or shared mortgage obligations, or physical repairs (or replacements), and whether she was seeking a money judgment against Ed, an offset against any accounting she had to make for the rent that came from the tenant, an equitable lien on Ed's share of the property, or off the top in a partition. (Partition is what Betty and Ed certainly ought to be advised about, but that issue was probably too sensible for the bar examiners to inquire about.)

At least a lot of students passed the previous bar, so the frivolity of the questions is not doing too much harm.

Post Script

- HUD has issued its final RESPA reform rule, with a new Good Faith Estimate form. See it at http://www.hud.gov/offices/hsg/sfh/res/resp_hm.cfm.
- As reported in 31 CEB RPLR 222 (Nov. 2008), CC §1675—the section that validates liquidated damage clauses in real estate sales contracts—has been amended (until 2014) to allow for 6 percent rather than 3 percent “in a contract for the initial sale of a newly constructed attached condominium unit in a building over eight stories tall, containing 20 or more residential units, and located in a high-density infill development in a city, county, or city and county with 1,900 residents or more per square mile, where the price is more than one million dollars (\$1,000,000), as adjusted by the Department of Real Estate.” (Stats 2008, ch 665, AB 2020.) Does anybody know where that is or what it is all about?